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No. 387.

In the

Supreme Court of the United States

October Term, 1950.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, District Council of Kansas City, Missouri, and Vicinity, A. F. of L., and WALTER A. SAID, as Agent for United Brotherhood of Carpenters and Joiners of America, District Council of Kansas City, Missouri, and Vicinity, A. F. of L., *Petitioners,*

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS AND WALTER A. SAID FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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United Brotherhood of Carpenters and Joiners of America, District Council of Kansas City, Missouri, and vicinity, A. F. of L., and Walter A. Said, as agent for United Brotherhood of Carpenters and Joiners of America, District Council of Kansas City, Missouri, and vi-

cinity, A. F. of L., pray that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Tenth Circuit, entered September 9, 1950 (R. 310), which enforced an order of the National Labor Relations Board issued against petitioners.

Opinions Below.

The opinion of the Court of Appeals (R. 302-309) is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 71-99) are reported in 81 N. L. R. B. 802.

Jurisdiction.

The decree of the Court of Appeals was entered on September 9, 1950 (R. 310). The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under 28 U. S. C. 1254 (1).

Questions Presented.

1. Whether an order directed to a union and its agent to cease conducting a secondary boycott becomes moot when the only secondary employer involved goes out of business and the dispute between the union and the primary employer has been settled by the signing of a collective bargaining agreement and the sending by the union of notices to all interested persons urging them to patronize the primary employer.

2. Whether an unfair labor practice affects commerce within the meaning of Section 2 (7) of the National Labor Relations Act when the only conduct burdening or obstructing commerce or having led or tending to lead to a labor dispute burdening or obstructing commerce is a fair labor practice because the strike against the primary employer is protected by the Act and the activities found to

be unfair involve only a secondary boycott of a secondary employer, with no inflow or outflow of goods in commerce, who is engaged in erecting small private homes in the same state as the primary employer.

3. If question 2 is answered in the affirmative, whether the Act as so applied is within the power of Congress under the commerce clause of Article I, Section 8, of the Constitution of the United States.

4. Whether the court below could properly enforce the Board's order on the ground that the union's activities were coercive when the Board expressly found that none of the union's activities was coercive.[1]

5. Whether the Board properly construed Section 8 (c) of the Act, which provides that communication without threats or promises "shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act," as inapplicable to unfair labor practices under Section 8 (b) (4).

6. Whether the Board properly construed Section 8 (b) (4) which provides that it shall be an unfair labor practice "to induce or encourage employees of any employer to engage in, a strike or a concerted refusal in the course of their employment," to handle goods as applicable where only a single employee of any one employer was so induced or encouraged.[2]

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[1] In this connection petitioners desire to reserve the right to urge in the event certiorari is granted that there was a fatal variance between the complaint which was limited to allegations of coercion (R. 117-118) and the Board's findings which rejected the allegations of coercion as not supported by the evidence (R. 90, n. 49, 97, 99, n. 61) but nevertheless held petitioners guilty of unfair labor practices (R. 84-90, 96-99).

[2] In this connection petitioners desire to reserve the right to urge in the event certiorari is granted that the only individual working for the alleged secondary employer who was so induced or encouraged was a supervisor within the meaning of Section 2 (11) of the Act (R. 124, 134, 178, 179, 193, 225-26, 227), and therefore not an employee within the meaning of Sections 2 (3) and 8 (b) (4) (A). Cf. *International Rice Milling, Inc.*, 84 N. L. R. B. 360, 361, set aside 183 F. 2d 21 (C. A. 5), petition for certiorari pending on other points, *National Labor Relations Board* v. *International Rice Milling, Inc.*, No. 313, this Term.

7. Whether the Board properly construed the foregoing language of Section 8 (b) (4) as applicable where an employee failed to handle goods because his employer directed him not to cross the picket line.

8. Whether the Board properly construed the words "to induce or encourage," in Section 8 (b) (4), as applicable to a mere inquiry by a union agent of one union member if he knew what conditions on the job were.

9. Whether the Board properly construed the words "a strike" or "a concerted refusal" to work with the object of "forcing or requiring" any person to cease doing business in Section 8 (b) (4) (A), as applicable to the conduct of an employee who entered upon employment with the secondary employer upon the employer's promise that the job was to be a union one and who transferred to work for a brother of the secondary employer with the acquiescence of the latter for the sole reason that all other employees hired were nonunion.

10. Whether the Board properly construed the words "doing business with any other person" in Section 8 (b) (4) (A) as applicable to the relationship between the manufacturer of prefabricated houses and its erector-dealer where the erector-dealer was organized after the labor dispute with the manufacturer arose, prior thereto the manufacturer erected its own houses, the business of the erector-dealer was limited to houses made by this manufacturer, and officers and employees of the manufacturer were present at the site of the erector-dealer supervising the erection of the houses.

11. Whether the Board properly construed Section 8 (b) (4) (A) as making it an unfair labor practice for a union to picket peacefully, with a sign stating truthfully that nonunion men are employed on this job, the site on which the erector-dealer was erecting prefabricated houses under the supervision of the manufacturer, to place

the erector-dealer on its "Do Not Patronize" list, and to inquire of one employee of the erector-dealer if he knew what conditions on the job were, where the absence of union men on the job was due either to the union's wage dispute with the manufacturer or to the erector-dealer's hiring of nonunion men, and none of the union's activities in this or any other regard was coercive as to either persons approaching the picket line, as to the erector-dealer, or as to anyone else.

12. If any of questions 5 to 11, inclusive, is answered in the affirmative, whether the Act as so construed violates the First, Fifth, or Thirteenth Amendments to the Constitution of the United States.

13. Whether the decree by barring the use of picketing, "Do Not Patronize" lists, or "related conduct" and thereby closing all channels of communication to the union, respecting its dispute with the manufacturer or the erector-dealer, violates the First, Fifth, or Thirteenth Amendments to the Constitution of the United States.

14. Whether the decree properly enjoined the union from engaging in conduct where an object thereof is to force or require employers or persons other than the erector-dealer to cease doing business with the manufacturer when the Board made no findings that the union had engaged in such conduct with respect to other employers or persons or that the union was likely to do so unless enjoined.

15. Whether the Board acted arbitrarily in entering an order against the union and its agent under the circumstances of this case when the Board in other cases involving legally indistinguishable circumstances has dismissed charges of unfair labor practices.

Statute Involved.

The pertinent provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*) are set forth in the Appendix, *infra*, pp. 59-61.

STATEMENT.

Upon a charge filed by Klassen & Hodgson, Inc., hereinafter called Klassen, and by Wadsworth Building Company, Inc., hereinafter called Wadsworth (R. 9-11), the Board, on December 5, 1947, issued its complaint alleging that United Brotherhood of Carpenters and Joiners of America, District Council of Kansas City, Missouri, and vicinity, A. F. of L., hereinafter called the Carpenters, and Walter A. Said, as agent of the Carpenters, engaged in unfair labor practices affecting commerce, in violation of Section 8 (b) (4) (A) of the National Labor Relations Act, as amended, in that on October 8, 1947, they induced and encouraged one Monroe to leave the employment of Klassen, and that on October 13, 1947, they induced and encouraged employees of Klassen to engage in a strike and concerted refusal in the course of their employment to perform services for Klassen, picketed Klassen, placed it on a "Do Not Patronize" list, and induced and encouraged employees of other employers not to transport or handle goods or perform services for Klassen, an object thereof being to force and require Klassen to cease doing business with Wadsworth (R. 12-15). At the opening of the hearing the complaint was amended to allege that the inducing and encouraging of employees was accomplished "by restraint, coercion, intimidation, threats of force or reprisal or promises of benefits" (R. 117-118).

The Carpenters and Said denied all the material allegations of the complaint both as originally filed (R. 15-20) and as amended (R. 117-118), and alleged that the unfair labor practices charged did not affect commerce within the meaning of the Act (R. 19-20), that Monroe was a supervisor and therefore not an employee within the meaning of Section 8 (b) (4) (A) of the Act (R. 18), that

the Carpenters had a bona fide labor dispute with Wadsworth to which Klassen was a party (R. 18), that the Carpenters had a bona fide labor dispute with Klassen over its failure to employ union members (R. 19), and that all of the conduct of the Carpenters and Said was protected by Section 8 (c) of the Act and by the First and Thirteenth Amendments to the Constitution of the United States (R. 20, 276).

The evidence presented at the hearing before the Trial Examiner, so far as is here material, disclosed the following:

I.

The Facts as Shown by the Evidence.

A. The strike against Wadsworth.

In the late summer or fall of 1946, Said read a report that Wadsworth was erecting ten houses in Overland Park, Kansas (Tr. 369). Said called Wadsworth, who explained that they were just getting started in the prefabrication of houses, had only three or four people working, expected to "go union" but wanted a little time first to get started (Tr. 369, 612). Said acquiesced but kept in touch with Wadsworth (Tr. 369-370, 612). Around the first of December, 1946, Said visited a building site at 62nd and Elmont, Mission Highlands, owned by Wadsworth where the latter was engaged in erecting its first house (Tr. 369-370, 612-613, 619, 641). At the time of his visit, the two Wadsworth brothers, L. D. and Bruce, respectively president and manager of Wadsworth Company, were present themselves participating in the erection of the house (Tr. 613). Said indicated he desired to negotiate a contract covering both the workers employed by Wadsworth in the prefabricating plant operated by

it at Overland Park, Kansas, and the workers employed by it in the erection of houses (Tr. 370).

After negotiations, which began with the Carpenters asking $1.50, and settling for $1.25, an hour for journeymen carpenters employed in the prefabricating end of Wadsworth's business, the Carpenters and Wadsworth on January 2, 1949, entered into a collective bargaining contract covering production and maintenance employees (R. 231-232, 253, Tr. 301-302, 370-371; Res. Exh. No. 2). Except for a 3-cent per hour differential in wage rates and a clause with respect to probationary employees, the contract contained the same terms as were then in force in contracts with the approximately 75 employers engaged in the manufacture of wood products in the Kansas City area (R. 232, 254, Tr. 321). With respect to workers employed by Wadsworth in the erection of houses, Wadsworth at the same time agreed with the Carpenters to become subject to the Carpenters' contract with the Home Building Division of the Real Estate Board covering the construction of residential building on the building site, by joining that organization (R. 232).

Wadsworth's contract with the Carpenters, like the contracts with the other wood manufacturers, permitted a re-opening of wage rates by the giving of notice 60 days prior to May 31, 1947 (R. 253). The Carpenters gave such notice to Wadsworth and the other wood manufacturers, under date of March 29, 1947 (R. 233). Negotiations were conducted between the Carpenters and the Millwork and Cabinet Manufacturers Association of Kansas City, which is composed of the 17 or 18 largest mill and cabinet employers, and the terms of whose contract with the Carpenters are regularly adopted by the smaller wood manufacturers (R. 254, Tr. 304-305). Bruce Wadsworth attended some of the bargaining sessions and

assured both his employees and Said that he would agree to whatever the Association did (R. 233-234, 254, Tr. 488).

On about June 12, 1947, the Association agreed to a 15-cents an hour wage increase, all other terms of the previous contract to remain unchanged (R. 234). Said promptly notified Wadsworth of this fact and presented a draft of the old contract with only the one change of a 15-cents per hour wage increase (R. 234, Tr. 306-309). On July 11, 1947, Wadsworth informed Said that he would not sign the contract (R. 234). Thereafter Wadsworth and the Carpenters negotiated respecting an independent contract (R. 234-235). Wadsworth was willing to offer only a five-cents an hour increase to present employees and also insisted that numerous other provisions of its previous contract with the Carpenters, such as the closed shop, the apprenticeship agreement and double time for Saturday work, be deleted (Tr. 309, 312, 384-386, 391-392, 413-414, 457, 473-474).

On August 14, 1947, twelve of the fifteen employees at that time working for Wadsworth attended a union meeting at which they voted unanimously to authorize the Carpenters to settle for a wage rate of $1.37 an hour for inside journeymen carpenters then in the employ of Wadsworth, the old rates to be applicable to new employees, and for a modified apprentice arrangement, but to go on strike on August 20 if Wadsworth was unwilling to settle on those terms (R. 236, Tr. 317-320, 384-386, 431, 457, 472-474, 532, 551). During ensuing negotiations Wadsworth refused to make any concessions and the employees went on strike on August 20, 1947[3] (R. 237, Tr. 326-328, 428-429, 457-458, 534-535, 558).

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[3]Six union members, acting on their own initiative and without union approval, even before the date set for the strike, left work because of Wadsworth's failure to sign the contract. One left on July 21 (Tr. 485, 493-495, 499). Five left on August 18 (R. 237, Tr. 533-535, 539-540, 558-559).

Beginning August 20, 1947, the Carpenters stationed two pickets at the Wadsworth plant, which pickets were still patrolling the property at the time of the hearing in this case (R. 237, 249). The picketing was entirely peaceful (Tr. 328). Wadsworth hired strikebreakers to replace the strikers and operated on a nonunion basis (R. 237, 275).

B. Klassen formed to erect Wadsworth houses.

On September 23, or 24, 1947, Said read a report that Walter A. Klassen was erecting a group of houses near Overland Park, Kansas (R. 221-222). Said at once visited the site where he talked to Harry Klassen, who explained to him that Walter Klassen, his brother, together with Osborne and Wagner, two officers of the Mission State Bank,[4] had formed a company to purchase land, and he, Harry Klassen, and one George Hodgson, had formed a company to erect Wadsworth houses on the land (R. 221-223). Said asked if Klassen knew the Carpenters were on strike at Wadsworth (R. 223). Klassen said he did but that he had made arrangements with the bank sometime in the middle or latter part of July to take these houses (R. 223). Klassen admitted he had no signed agreement to take the houses, but claimed he had an informal agreement with the bank to take 10 or 15 houses at $2900 to $3000 per house if he could get that many under roof before winter set in (R. 222-223, 123, 181). Said suggested that Klassen set a date to meet with the Committee of the Building Trades to discuss the project (R. 223).

At the time of this first meeting between Said and Klassen, no houses had yet been delivered to Klassen. About September 25, 1947, Klassen hired Jones, a non-

[4]Wadsworth's business is financed by loans from the Mission State Bank (Tr. 611-612).

union laborer, and Klassen and Jones began to lay out the job and construct forms for the footing of one house (R. 135, 137, 138). On September 29, the first house was delivered to the building site by a Wadsworth truck and Monroe, a union carpenter, whom Klassen had hired as his carpenter foreman, began work (R. 123-124, 134, 178, 229). A day or so later Klassen hired Prather, a non-union carpenter, who too went immediately to work (R. 127, 228). Bruce Wadsworth and French were present during the erection of the houses to give directions and supervise (R. 148, 226).

C. Efforts to unionize Klassen.

On October 8, 1947, a subcommittee of the Building Trades Council for the Kansas City Metropolitan area, composed of the business agents of each of the trades involved in the erection of a house, met with Klassen (R. 182-183, 229). The Committee pointed out as objections to clearing Klassen Company as a union project such matters as Klassen and Hodgson themselves working with tools (R. 148-149, 164, 195, 242), the fact that their painter was not a union contractor (R. 150, 184, 238, 267), the non-union status of the carpenter, Prather (R. 241, 255), the non-union status of the concrete contractor's labor (R. 241), and the erection of houses made by strike-breakers (R. 128, 241, 255).

The Committee asked Klassen for evidence that he had made some commitment to take these houses before the labor dispute at Wadsworth arose, because the Committee would have respected fully any ante labor dispute commitments (R. 238-239). Klassen, however, not only failed to show that any commitment had been made before the dispute arose but rather gave the impression that Klassen had been organized after the labor dispute arose for the

sole purpose of erecting houses which Wadsworth manufactured (R. 239).[5]

The Committee suggested that Klassen take a hand in settling the Wadsworth strike (R. 129-130, 184). They pointed to the officers of Mission State Bank, which was financing both the Wadsworth prefabrication activities, and Klassen in its purchase of the houses and two officers of which bank, together with Walter Klassen, owned the land on which Klassen was erecting houses (R. 141-145, 190-191, 222-223, 239), as possible intermediaries in helping work out a settlement (R. 129-130, 184). Klassen, however, refused even to undertake to raise the matter with Wadsworth either directly or indirectly (R. 129-130).

Klassen also rejected suggestions that either a conventional house or some other prefabricated house be used, pointing out that Wadsworth's house was cheaper (R. 129, 139, 184, 194, 241).

The Committee came to no conclusion at the meeting but promised to discuss the matter among themselves and let Klassen know the outcome (R. 164, 185, 243).

D. Monroe quits Klassen.

After the meeting, Said saw Monroe, the carpenter foreman, and asked Monroe to telephone him that evening (R. 176, 245). Monroe did so (R. 177, 246). Said, when called, merely asked Monroe whether he knew "what the condition was on the job out there" (R. 177, 246). Monroe replied that he did and that he was quitting the job that night (R. 177, 246). Nothing more was said (R. 34).

The next morning Monroe told Harry Klassen that he had understood when he was hired that the project was to be a union job; that he had left a union job to come to work for Harry Klassen; that he had been with Harry

[5]The prefabricators in that area generally erected their own houses (Tr. 460, 555, 659).

Klassen a week but all the employees hired had been nonunion and therefore he wanted to quit and go back to work for Harry Klassen's brother, Walter Klassen (R. 177-179). Harry Klassen made no objection but on the contrary agreed that since Monroe was a union man, Monroe's proposed transfer to work for Walter Klassen was the proper course of conduct for Monroe to follow (R. 130-131). Accordingly, on October 9, 1947, Monroe quit his job with Klassen Company and immediately went to work for Walter Klassen on a union job (R. 131, 174, 177, Tr. 107).

E. Klassen picketed and listed "unfair."

On October 13, 1947, after receiving a report from the Committee which called on Klassen, the Building Trades Council adopted a resolution that Klassen be placed on the "We Do Not Patronize" list and be picketed (R. 203-204, 277). The "We Do Not Patronize" list is not a written list (R. 249, 272). The minutes containing the resolution were sent, as was the usual practice, to all affiliated unions and to the Builders Association which is composed of contractors, subcontractors, and material men operating in the construction field and which has a master contract with the Building Trades Council (R. 36, 203-205, 249, 272, Tr. 188).

On October 14, 1947, a picket supplied by the Laborer's Union appeared in front of the Klassen building site carrying a sign which stated merely what was the fact, that nonunion men were employed on that job (R. 131, 202-203). The picketing was wholly peaceful in character, did not involve any trespass on private property and was carried on in silence, the picket following the practice of not speaking to anyone (R. 199, 203).

In several instances a driver for a material man declined to carry goods through the picket line but, except

in the instances of Cook and Cartmill, the evidence did not disclose whether the refusal was pursuant to instructions from the employer of the driver, or was the result of individual decision by the driver (R. 38, 132-133, 157). The telephone company declined to install a telephone while the picket patrolled the premises, but there is no evidence of refusal by the telephone company's employees (R. 38, 133).

Cook, a truck driver employed by the Sawyer Material Company, was sent to Klassen on about December 3, 1947, to make a delivery with the express instruction from his employer, given before he left the office, that if there was a picket there, "not to cross the line, to bring the stuff back" (R. 172-173). When Cook saw the picket he obeyed his employer's instructions and did not make the delivery (R. 173). Most employers in the Kansas City area in either building and construction, or in related fields such as supplying materials for the industry, are bound by contracts with the Building Trades Council not to handle struck goods nor to make deliveries across picket lines (R. 188, 232-233, 240-241, 243, 261-263, 279-280, Tr. 188).

Cartmill, a truck driver employed by Mission Lumber Company, upon seeing a picket at Klassen on December 3, 1947, turned around and returned a load of lumber to the lumber yard rather than deliver it (R. 170). Cartmill testified that he did this because he would not cross a picket line (R. 171).

F. Effect on commerce.

During the two year period preceding the hearing Wadsworth purchased raw materials valued at $200,000, of which 90 to 95 per cent was secured from sources outside the State of Kansas (R. 120-121). During that same period Wadsworth sold finished products valued at $270,-

000, of which about 50 per cent was shipped into the State of Missouri (R. 120-121). Of the 50 houses Wadsworth had erected at the time of the hearing, all had been placed in Kansas or Missouri within an area of 300 or 400 miles of the plant (Tr. 659).

There was no evidence that Klassen bought or sold any materials which cross state lines. At the time of the hearing it had purchased only two houses from Wadsworth at a price of $2900 to $3000 per house (R. 123, 132, 181, 223). Klassen was erecting these houses in or near Overland Park, Kansas, the same town in which they were manufactured (R. 120, 123).

II.

The Trial Examiner's Findings.

The Trial Examiner found that Klassen was not engaged in commerce but that an interruption of the inflow or outflow of goods at Wadsworth's would interrupt commerce (R. 24).

With respect to the unfair labor practices charged, the Trial Examiner found that the evidence sustained only one allegation of the complaint, namely, that employees of suppliers of material to Klassen were induced and encouraged by the Carpenters to engage in a concerted refusal to deliver materials to Klassen in violation of Section 8 (b) (4) (A) of the Act (R. 54). This finding of the Trial Examiner rested on his determination that "the picketing caused at least Cartmill, and apparently Cook also, both employees of employers, to decline to make deliveries to Klassen. These employees were members of a union—the Truck Drivers—affiliated with the Trades Council. As to these persons then, the picket line contained an implicit threat of discipline from their own

union, and constituted inducement and encouragement of employees contrary to the statute" (R. 49). The Trial Examiner concluded that the Carpenters and Said were responsible for the implicit threat of discipline by the Truck Drivers Union because both unions were members of the Building Trades Council, the picketing of Klassen was thus their joint enterprise, and the fear of reprisal from their own union was a reasonably foreseeable consequence of the picketing (R. 50).

The Trial Examiner found that Monroe quit of his own volition, and was not induced or encouraged to do so by Said (R. 52). He therefore deemed it unnecessary to rule on the defenses that Monroe was a supervisor and hence not an employee and that inducement or encouragement of a single employee to quit was not inducement or encouragement of a "strike or concerted activity" (R. 52).

III.

The Board's Decision.

The Board determined that "Wadsworth, against whom the [Carpenters'] activities were ultimately directed" was engaged in commerce as defined by the Act and therefore the alleged unfair labor practices affect commerce within the meaning of the Act (R. 73).

The Board further determined that Klassen "was an 'unconcerned' or 'neutral' party" whom Congress "intended to be protected from economic pressure exerted by the Respondent Carpenters in aid of its primary dispute with Wadsworth" (R. 77).

The Board reversed the Trial Examiner's finding that the picketing implied a threat of economic reprisal and found instead that the Carpenters' conduct contained

"no threat of reprisal or force or promise of benefit" (R. 90, n. 49, 97). Three members of the Board held the picketing nevertheless an unfair labor practice under Section 8 (b) (4) (A), for they believed Congress did not intend that section to be qualified by Section 8 (c), despite the latter section's express injunction that the "expressing of any views, argument, or opinion, or the dissemination thereof, * * * shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit" (R. 84-90, 96-99). One of the three (Chairman Herzog) expressed grave doubts as to the constitutionality of such an interpretation, but deemed the Board as a creature of Congress not empowered to pass on the constitutional issue (R. 98-99). The two dissenting Board members (Houston and Murdock) who would have dismissed the entire case on the ground that Section 8 (c) applied, expressed grave doubts as to the constitutionality of Section 8 (b) (4) (A) as interpreted and applied by the majority of the Board (R. 103).

Because of its view that Section 8 (c) was inapplicable the Board, although agreeing with the Trial Examiner's determination that the "We Do Not Patronize" list was a non-coercive argument, held that it was a means used by the Carpenters to induce and encourage strikes and concerted refusals to handle goods in violation of Section 8 (b) (4) (A) of the Act (R. 91).

The Board also reversed the Trial Examiner's finding that Monroe had quit of his own volition and was not induced or encouraged to do so by Said (R. 92). It therefore considered the issue of Monroe's supervisory status, which the Trial Examiner had not reached, and held him to be an employee within the meaning of the Act (R. 93).

With respect to the contention that inducing a single employee to quit was not inducing a "strike or concerted refusal," the Board, without explaining what it meant thereby, stated that the activity with respect to Monroe although it occurred at least five days before the picketing or circulation of the unfair list, was part of the "total activities" of the Carpenters with respect to inducing and encouraging "other employees to engage in a strike or concerted refusal in order to compel Klassen to cease doing business with Wadsworth" (R. 93). The Board concluded that Carpenters violated Section 8 (b) (4) (A) of the Act by calling Monroe off his job (R. 93).

The Board accordingly ordered the Carpenters and Said to cease and desist picketing and use of the "We Do Not Patronize" list for the purpose of requiring Klassen or any other employer to cease doing business with Wadsworth, to withdraw support and sponsorship of the picketing and "We Do Not Patronize" list, to notify Monroe that he is free to work for Klassen, and to post at the business office of the Carpenters notices stating it will comply with the foregoing, and to send copies of the notice to various affiliated labor organizations and to Monroe (R. 94-96, 110-111).

IV.

Proceedings Before the Court Below.

The Board filed a petition in the court below seeking enforcement of its order (R. 1-3). The Carpenters and Said in their answer to the petition for enforcement asserted, *inter alia,* that the petition should be dismissed because the Board's order had become moot in that Klassen Company had been dissolved; Klassen had become a member of the Bricklayers' Union affiliated with the Building Trades Council and was working as a member

of that union; Hodgson had for many months ceased to be in any way identified with the building industry; Wadsworth on February 24, 1949, entered into a collective bargaining contract with the Carpenters settling the strike; and the Carpenters on March 2, 1949, notified all unions and all other persons, firms and corporations engaged or interested in the building industry in the area that all differences between Wadsworth and Carpenters had been settled and that the Carpenters recommend "to you, and to our membership, the use of 'Wadsworth Homes'" (R. 3-4).

On December 19, 1949, the court below, Judge Huxman dissenting, held that the case was not moot (R. 297).

The answer to the petition for enforcement also urged as defenses that unfair labor practices found did not affect commerce within the meaning of the Act (R. 8); that there was not substantial evidence to support the Board's finding that the Carpenters induced and encouraged either Monroe, other employees of Klassen Company, or employees of other employers to engage in a strike or concerted refusal to work within the meaning of Section 8 (b) (4) (A) of the Act (R. 7); that the Board ignored the provision in Section 8 (b) (1) which preserves the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership (R. 7); that Section 8 (c) should have been held applicable to Section 8 (b) (4) (A) (R. 7); and that the construction placed by the Board on Section 8 (b) (4) (A) renders it unconstitutional as applied to the facts of this case (R. 7-8).

On August 14, 1950, the court below handed down its opinion upholding the Board's order (R. 302-309). It held that the unfair labor practices against Klassen affected commerce (R. 307-308). With respect to the Board's

concern as to whether Section 8 (c) was intended to apply to Section 8 (b) (4) (A), the court ignored this issue because, contrary to the Board's findings, the court deemed the Carpenters' conduct coercive (R. 305-306). Because Wadsworth and Klassen were completely separate corporations in ownership and management, it held that Klassen was a neutral, unconcerned employer respecting the labor dispute between Wadsworth and its employees (R. 308). With respect to whether the terms "employees of any employer," "strike" and "concerted refusal" in Section 8 (b) (4) (A) were properly construed by the Board as applicable to action by a single employee of each of several employers, or the latter terms to action which was directed or acquiesced in by the employer, the court treated these as substantial evidence questions, although there was no dispute about the facts (R. 308-309).

On September 9, 1950, the court below entered its decree enforcing the Board's order (R. 310-313).

SPECIFICATIONS OF ERRORS TO BE URGED.

The court below erred:

1. In holding that the case was not moot.

2. In holding that the union's activities with respect to Klassen affected commerce within the meaning of Section 2 (7) of the National Labor Relations Act.

3. In failing to hold that the Act as applied by the Board to the activities of the union with respect to Klassen exceeded the power of Congress under the commerce clause of Article I, Section 8, of the Constitution of the United States.

4. In enforcing the Board's order upon the ground that the union's activities were coercive when the Board found that none of the union's activities was coercive.

5. In enforcing the Board's order upon a theory different from that upon which the Board based its order.

6. In substituting its finding respecting the coercive character of the union's activities for that of the Board.

7. In finding that the evidence showed the union's activities were coercive.

8. In failing to hold that Section 8 (c) immunized the activities of the union from proscription under Section 8 (b) (4).

9. In holding that the union's activities were not protected by the First, Fifth and Thirteenth Amendments to the Constitution of the United States.

10. In holding that Klassen was a neutral employer unconcerned with the dispute between Wadsworth and its employees.

11. In holding that the union was conducting a secondary boycott of Klassen.

12. In failing to hold that inducing or encouraging Monroe to quit employment with Klassen did not come within Section 8 (b) (4) (A).

13. In failing to hold that Monroe was a supervisor within the meaning of Section 2 (11) and therefore not an employee within Sections 2 (3) and 8 (b) (4).

14. In failing to hold that the inquiry by Said of Monroe respecting conditions at Klassen did not constitute inducement or encouragement to quit his employment within Section 8 (b) (4) (A).

15. In failing to hold that Monroe's transfer with the acquiescence of Klassen to work for Klassen's brother did not constitute a "strike" or "concerted refusal" to work, or a "forcing or requiring" of action by his employer, within Section 8 (b) (4) (A).

16. In failing to hold that Cook's obedience of his employer's directions not to cross the picket line did not constitute a "strike" or "concerted refusal" to work within Section 8 (b) (4) (A).

17. In failing to hold that the union's activities with respect to Cartmill did not constitute an unfair labor practice within Section 8 (b) (4) (A).

18. In failing to hold that there was a fatal variance between the complaint alleging only coercive unfair labor practices and the Board's findings of noncoercive unfair labor practices.

19. In failing to hold that the Board's inconsistent action in other cases rendered its decision in this case arbitrary.

20. In entering a decree which violated the First, Fifth, and Thirteenth Amendments to the Constitution of the United States.

21. In entering a decree enjoining the union from conduct in which it was neither found to have engaged nor shown a likelihood to engage.

22. In enforcing the Board's order.

REASONS FOR GRANTING THE WRIT.

This case presents important questions of the construction of the Labor Management Relations Act which have not been, but should be, decided by this Court. This case further presents questions of the constitutionality of various provisions of that Act should the construction adopted by the Board and the court below be sustained.

Free Speech Issues.

1. There are now pending before this Court petitions for writs of certiorari in two other cases involving various of the questions here presented. *Local 74, United Brotherhood of Carpenters* v. *National Labor Relations Board,* No. 85, this Term; *International Brotherhood of Electrical Workers, Local 501,* v. *National Labor Relations Board,* No. 108, this Term. Cf. *National Labor Relations Board* v. *International Rice Milling Co.,* No. 313, this Term. The instant case also brings here several important questions not urged before this Court in those cases. Foremost among these is our question 5, whether Section 8 (c) qualifies Section 8 (b) (4) (A). The petition in No. 108, this Term, raises the question of the constitutionality of forbidding picketing under the circumstances of that case. In addition to likewise presenting the constitutional question we desire to urge that Section 8 (c) of the Act is more than a statutory re-enactment of the First Amendment in that it immunizes from use as evidence of, or from proscription as, an unfair labor practice, communications not thus constitutionally privileged. The instant case, moreover, raises questions not only of the immunity for picketing, but for all other forms of union communication.

Section 8 (c) provides that the expression of views, argument, or opinion unaccompanied by threats or promises "shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act." If Congress intended this section to be read literally it is apparent that this section confers numerous immunities not granted by the First Amendment as interpreted by this Court. The use of noncoercive communication as evidence in both civil and criminal cases has never been held barred by the First Amendment. Cf. *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 479. But limitations of noncoercive communications as to geographic locale, economic locale and justifiable objective have been deemed consistent with the First Amendment. The drafters of Section 8 (c) ignored the contours of the First Amendment as spelled out in *Carpenters Union* v. *Ritter*, 315 U. S. 722, and *Giboney* v. *Empire Storage & Ice Co.*, 336 U. S. 490. They wrote no such qualifications or restrictions into Section 8 (c).

The legislative history of Section 8 (c) forecloses any possible contention that Section 8 (c) was intended to afford no greater protection to communication than the First Amendment. Dissatisfaction with the scope of protection given communication under court, as well as Board, interpretations of the First Amendment was the expressed reason for the insertion of Section 8 (c) in the Act. S. Rep. No. 105, 80th Cong., 1st Sess., pp. 23-24; 93 Cong. Rec. 4893. There was considerable diversity of opinion among the members of the Senate as to how congressional rectification of undue limitations on free speech should be achieved. Senator McClellan proposed an amendment providing that in the application of the Act administrators and courts should not infringe upon "freedom of speech as guaranteed by the First Amendment to the Constitution of the United States." That

this amendment would be ineffective to accomplish the congressional purpose was made clear by Senator Ferguson, who stated (93 Cong. Rec. 4893):

> I was wondering how this amendment would change the law. The highest law of the land, namely, the Constitution, is being cited in this amendment. If the same court is to construe this law which has been construing the Constitution, how can any change be effective?

The formulation proposed by Senator McClellan was thus rejected and a formulation adopted which Congress intended the courts should apply without the limitations and mutations which have been read into the First Amendment. Thus the whole purpose of Congress in writing Section 8 (c) would be defeated should the courts start narrowing it to coincide with the First Amendment.

The instant case squarely presents the issue of the applicability of Section 8 (c) to Section 8 (b) (4) (A). Here the Board found that each act which it deemed an unfair labor practice was an expression of views, argument, or opinion which contained "no threat of reprisal or force or promise of benefit," express or implied (R. 90, n. 49, 97). The chief issue litigated at the hearing was whether the union's conduct involved any threat. The complaint as amended alleged that each of the unfair labor practices was accomplished "by restraint, coercion, intimidation, threats of force or reprisal or promises of benefit" (R. 118-119, 12-15). The answer denied this (R. 118-119). The General Counsel made no attempt to prove any express threats; instead in introducing evidence in support of this allegation he proceeded upon the theory that picketing, unfair lists, and even mere inquiries by a union agent of an employee respecting the union status of the job he was working on, were impliedly coercive—

as to union members because they would fear fines or expulsion from the union should they work on a nonunion job; as to nonunion members because they would fear reprisals from the union in attempting to secure further employment (R. 51, 90, n. 49, 97, n. 57, Tr. 692-695).

The evidence failed to sustain the General Counsel's theory of implied threat. It showed that while the Carpenters had rules which prohibited members from working on woodwork manufactured by nonunion labor and theoretically could have fined or suspended a member for violation of the rule, these rules had never been so enforced (R. 208-209, 219-220, 257-259). Similarly, with respect to several other union rules which may have forbidden crossing of the picket line, it was undisputed that the rules had never been enforced by union punishment of individual union members (R. 209, 213-216, 220, 221, 257-259). Nor did any of the witnesses testify to having ever heard of anyone being so much as threatened with enforcement of the rules (R. 213, 221). To the extent that the rules had been observed, their observance had been due to the individual decision of the employee based upon his own judgment as to the right and wrong of the situation, uninfluenced by any fear of union reprisal (R. 211, 257). The union had limited itself to determining the facts and informing union members thereof (R. 217-221). As illustrative of the character of the union's activities is the fact that one union member who had continued to work at Wadsworth after the strike, crossing the picket line daily, testified and made no mention of any union effort to induce him to go on strike (Tr. 672-676, 310). There was of course no contention made that either the strike or the picketing of Wadsworth constituted an unfair labor practice (R. 42).

The General Counsel attempted to prove that three specific employees, Monroe, Cook, and Cartmill, were

induced by fear of union reprisals to refuse to perform services for, or deliver goods to, Klassen. With respect to Monroe, the evidence established: Monroe had been a member of the Carpenters for five years (R. 175). In July, 1947, he was working for Vawter, a prefabricator engaged in erecting houses on a site near Overland Park, Kansas, who operated under a contract with Carpenters (R. 178, 179, Tr. 371, 460-461, 541). While he was so employed Klassen came to Monroe's home and asked him to become his carpenter foreman at $2.15 per hour (R. 178). Monroe asked if Klassen intended to operate a union job (R. 179). Klassen assured him he did (R. 179, Tr. 27, 29, 106). Monroe thereupon agreed to become Klassen's foreman when Klassen began erecting houses (R. 134).

Monroe reported for work with Klassen on September 5th but Klassen was not ready for him, so he went to work for Walter Klassen, Harry Klassen's brother, who was engaged in a union construction project (R. 175, Tr. 107). Monroe began to work for Klassen on September 29, 1947 (R. 175). On October 2, 1947, Said visited the Klassen building site, told him that the pickets at Wadsworth had reported someone from Klassen's was crossing the Wadsworth picket line, and asked if Monroe had been the one crossing the picket line (R. 225-226). Monroe assured Said that he had not, and suggested it was probably Klassen himself (R. 227).

On October 8, 1947, after the Council meeting, Said saw Monroe as he was leaving the site and asked Monroe to call him that evening (R. 176, 245). Monroe did so (R. 177, 246). Said, when called, merely asked Monroe whether he knew "what the condition was on the job out there" (R. 177, 246). Monroe replied that he did and that he was quitting the job that night (R. 177, 246). Nothing else was said (R. 34).

The next morning, October 9, Monroe reminded Klassen that he had left a union job to come to work for Klassen upon the assurance it was to be a union job, that all the employees hired were nonunion, and therefore he was going back to work for Walter Klassen, on a union job (R. 130-131, 177-179, Tr. 107). Klassen agreed this was the proper course for Monroe to follow and Monroe did so (R. 130-131, 174-177). On October 9, when Monroe quit, the union committee which called on Klassen had not yet made any decision about Klassen. It was October 10 before they reported to the full committee and October 13 before the Building Trades Council made a decision as to picketing Klassen or placing him on the unfair list (R. 203, 246-247, 273, 277, 280). Picketing did not begin until October 14 (R. 131, 202-203). Monroe testified that he quit of his own volition because he did not want to work on a nonunion job (R. 177-179).

With respect to Cook the evidence showed: The picketing of Klassen was conducted by a single patrol who carried a sign stating that nonunion labor was employed on this job (R. 131, 202-203). The picket spoke to no one (R. 199, 203). Around December 3, 1947, Cook, an employee of Sawyer Material Company, and a member of the Building Material, Heavy Excavating and Heavy Hauling Truckdrivers No. 541, AFL, was told to make a delivery of goods to Klassen but if there was a picket to bring the goods back and not to cross the picket line (R. 172-173). Cook saw the picket and obeyed his employer's instructions (R. 173).

With respect to Cartmill the evidence showed: He was employed by Mission Lumber Company and was a member of the same drivers' union as Cook (R. 170). On December 3 he failed to deliver a load of lumber to Klassen because "I would not cross a picket line" (R. 171).

There was no evidence that the union spoke to or contacted directly or indirectly any employee working for Klassen except Monroe. There is no evidence that the union approached any employees of any other employer directly or indirectly except insofar as the unfair list sent to their union may have been read at some union meeting (R. 203-205, 249, 272).

Upon the basis of the foregoing evidence the Trial Examiner rejected the General Counsel's theory that the union coerced Monroe to leave his employment with Klassen (R. 52). The Trial Examiner found that the picketing did constitute an implied threat of reprisal as to union (R. 49-50) but not as to nonunion members (R. 53). However, as none of Klassen's employees at the time picketing began, or at any time thereafter, was a union member, the Trial Examiner did not regard the picketing as a prohibited inducement or encouragement of them to strike or to refuse to work (R. 53). The Trial Examiner found that the circulation of the "Do Not Patronize" list did not constitute any threat (R. 50-51).

The Board unanimously reversed the Trial Examiner's finding that the picketing contained an implied threat (R. 90, n. 49, 97, 110). And the Board adopted his findings that neither the conversation with Monroe nor the "Do Not Patronize" list contained any threat (R. 84, n. 35). Said Chairman Herzog (R. 97):

> Here men induced and encouraged other men to refrain from expending their labor to erect, for one employer, prefabricated houses manufactured by another employer directly involved in the primary dispute. The means adopted consisted of wholly uncoercive action and expression: a conversation, peaceful picketing with truthful signs, and the circulation of a "do not patronize list." The means do not shock

and "contain" no threat of reprisal or promise of benefit.[37]

[37] I reject the General Counsel's extravagant theory that the picketing and the unfair list were themselves inherently coercive.

Despite this finding the majority of the Board held that the conversation between Said and Monroe occurring at least five days before the picketing began (R. 93, n. 53), the picketing, and the circulation of the "Do Not Patronize" list, were each independent unfair labor practices (R. 90, 91, 93). To reach this conclusion three Board members held that Section 8 (c), which they admitted was by its express terms applicable to Section 8 (b) (4) (A) of the Act (R. 84), should nevertheless be construed as inapplicable (R. 78-90). Two Board members dissented (R. 99-110).

The court below did not pass on this question because it substituted its findings that the conduct of the union was coercive for those of the Board that it was noncoercive (R. 305-306).

In addition to violating Section 8 (c) by finding that noncoercive communication constituted an unfair labor practice, the Board in the instant case repeatedly violated that section's prohibition on the use of noncoercive communication as evidence of an unfair labor practice. Illustrative is the evidence used by the Board in reaching its determination that Monroe was induced and encouraged by the union. Here the Board took an innocuous conversation between Said and Monroe occurring on October 8 and read into it meanings by relating back two occurrences on October 14 and December 3 (R. 93). The Senate draft of Section 8 (c), was less restrictive upon the use of communication as the basis for a finding of unfair labor practices than the section as passed by Congress, in that it permitted a finding of threat or promise when the

communication was considered "under all the circumstances" (H. R. 3020, 80th Cong., 1st Sess., as passed Senate). This language was stricken because it was believed that the Board and the courts had in the past rendered hazardous speech, innocuous in itself, by creating an ever present danger that later events might give it meanings not present on its face (H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 45; 93 Cong. Rec. 6443-6444, 6859). It is obvious that the Board's finding that the union called Monroe off his job in violation of Section 8 (b) (4) (A) of the Act (R. 93) is just the type of finding which Congress intended to preclude.

The Board attempted to justify its rewriting of Section 8 (c) on the ground that to qualify the words "induce" and "encourage" in Section 8 (b) (4) (A) by the limitations of Section 8 (c) would change them into "coerce or restrain" (R. 84-85). But this does not justify rewriting Section 8 (c). Limiting Section 8 (b) (4) (A) leads to no ambiguity or absurdity. Reading a qualifying section of a statute into the other sections usually does change their meaning. This is the purpose of the qualifying section. Indeed, reading Section 8 (c) into Section 8 (a) (1) completely reads out the word "interfere" since "restrain" and "coerce" are already there and with the qualifications of Section 8 (c) the word "interfere" adds absolutely nothing. Reading Section 8 (c) into Section 8 (a) (2) changes the word "interfere" there used into "restrain or coerce."

There being no ambiguity or absurdity on the face of the statute there is no need to resort to legislative history. *Packard Motor Car Co.* v. *National Labor Relations Board,* 330 U. S. 485, 492. If we do go outside the statute for guidance as to its meaning, we, nevertheless, come to the same conclusion. There is not a single statement by the proponents of the Act during the period of its enact-

ment that Section 8 (b) (4) (A) was not covered by Section 8 (c). The sponsors of Section 8 (c) vigorously defended its fairness on the ground it would apply to unfair labor practices of unions as well as unfair labor practices of employers. Senator Taft in a colloquy with Senator Ives during the course of which Senator Taft insisted that all the provisions respecting unions were paralleled by provisions respecting employers, stated (93 Cong. Rec. 4020):

> I may point out that the provision regarding free speech applies both to employer and employee.

To the same effect see H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 45; H. Rep. No. 245, 80th Cong., 1st Sess., pp. 6, 33; S. Rep. No. 105, 80th Cong., 1st Sess., p. 23; 93 Cong. Rec. 4893, 6443, 6859.

On July 8, 1947, in a series of written questions and answers (93 Cong. Rec. A. 3370) Senator Taft in response to the question of whether an appeal by a union urging all working people, members of its own union, members of other unions, and members of the public generally, to refuse to buy goods from a particular employer, would violate the Act, stated, "This is not forbidden by the Act, since it is merely persuasion." Since Section 8 (b) (4) (A) is the only boycott section of the Act, this statement by the sponsor of the Act shows that he intended Section 8 (c) to qualify Section 8 (b) (4) (A).

The long and bitterly disputed fight over the extent of an employer's privilege to interfere with employee self-organization by spoken or written communication is familiar to this Court. *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 479; *Thomas* v. *Collins*, 323 U. S. 516, 537-538, 548; *National Labor Relations Board* v. *American Tube Bending*, 134 F.

2d 993 (C. A. 2), certiorari denied, 320 U. S. 768. Section 8 (c) represents the congressional answer to this problem, an answer which Congress intended to apply to unions as well as employers. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 45; S. Rep. No. 105, 80th Cong., 1st Sess., pp. 23-24. The holding of the Board in the instant case that Congress did not intend the free speech guarantee of Section 8 (c) to protect unions when charged with one of the major types of union unfair labor practices under the Labor Management Relations Act, requires prompt review by this Court.

2. If Section 8 (c) does not immunize the conduct here involved, the constitutionality of Section 8 (b) (4) (A) becomes an issue. Three Board members expressed grave doubts as to the constitutionality of the construction adopted by the majority of the Board but the one of the three who joined in the majority decision deemed it inappropriate for an administrative agency to hold the statute under which it operated in any respect unconstitutional (R. 99, 103).

In view of the Board's express finding that all of the union's conduct in this case, including the picketing, involved no more than the noncoercive persuasion of other workers, we believe this case is governed by *Bakery Drivers* v. *Wohl*, 315 U. S. 769; *Cafeteria Employees* v. *Angelos*, 320 U. S. 293; *American Federation* v. *Swing*, 312 U. S. 321; *Thornhill* v. *Alabama*, 310 U. S. 88. The more recent cases of *Hughes* v. *Superior Court*, 339 U. S. 460; *Teamsters Union* v. *Hanke*, 339 U. S. 470; and *Building Service Union* v. *Gazzam*, 339 U. S. 532, involved picketing which in addition to being communicative was also coercive. In the *Gazzam* case the decision of the Supreme Court of Washington had been based on the fact that the picketing therein had lost its protection since it had

stepped "over the line from persuasion to coercion." 339 U. S., at 536, n. 2. In the *Hughes* case this Court upheld the right of a state to enjoin picketing "because of the compulsive features" there present which placed the picketing "beyond the aspect of mere communication as an appeal to reason." 339 U. S., at 468. And in the *Hanke* case, this Court, observing that "because of the interference by the pickets with the use of one of Cline's driveways, he was forced to close it" (339 U. S., at 473), concluding that the "ingredient of communication" present in picketing (at 474) did not save it from state restrictions "leaving all other channels of communication open to the union" (at 477).

Furthermore, the *Hughes, Hanke* and *Gazzam* cases involved only picketing. Here the conversation between Said and Monroe, and the "Do Not Patronize" list, had none of the non-speech aspects which this Court felt inhered in the picketing involved in those cases.

And, the express recognition by the Court in those cases that, even as to an objective made unlawful by the state, picketing could only be banned when other channels of communication remained open to the union (339 U. S., at 477), is a further indication that the Board's decision in this case constitutes an unconstitutional application of Section 8 (b) (4) (A). As here construed Section 8 (b) (4) (A) blocked all channels of communication—inquiries by business agents of union members as to conditions on the job and notices to other unions that an employer is unfair. Indeed, the decree here entered not only banned the foregoing but also "related conduct" (R. 311).

Construing Words "Strike" and "Concerted Refusal."

3. Other important questions respecting the construction of Section 8 (b) (4) (A) presented by this case which are not raised in cases Nos. 85 and 108, this Term, arise from the fact that only a single employee of any one employer was induced or encouraged by the union in this case, and as to only one employee of one employer was the induced or encouraged conduct possibly at variance with his employer's wishes.

The Trial Examiner found that none of the employees of Klassen was induced or encouraged by the union in violation of Section 8 (b) (4) (A) and dismissed this allegation of the complaint (R. 54). The Board reversed this finding only with respect to Monroe (R. 93). Monroe was found to have been induced or encouraged by the union on October 8, 1947, before the union had even decided to picket Klassen or place him on the unfair list (R. 36-37, 51, 93; 176-177, 203, 247, 277).

As to inducing and encouraging employees of other employers by picketing, the Trial Examiner found that the union induced and encouraged only two employees (R. 49-50). One of these was Cook, an employee of the Sawyer Material Company (R. 172), and the other, Cartmill, an employee of the Mission Lumber Company (R. 170). Cook and Cartmill each acting independently of the other, observed the picket line on or about December 3, and did not cross it, Cook because his employer told him not to cross it, Cartmill because he would not cross a picket line (R. 38, 39, 49-50; 170-171, 172-173). The Board made no finding that the union had induced or encouraged any other employees to strike or refuse to handle goods or perform services for Klassen.

Read literally, Section 8 (b) (4) (A) does not apply in these circumstances. This section provides that it shall be an unfair labor practice to induce or encourage "the

employees of any employer to engage in a *strike* or *concerted* refusal in the course of *their employment"* (emphasis supplied). In order to apply here Section 8 (b) (4) (A) would have to be rewritten by changing the phrase "the employees of any employer" to read "an employee of any employer" or "the employees of employers"; by changing the word "strike" to "termination of employment"; by changing the phrase "concerted refusal" to "individual refusal"; and by changing the phrase "their employment" to "his employment."

Assuming that Monroe was induced or encouraged to leave Klassen's employment, which we deny, it is impossible to bring his action within the concept of either "a strike or concerted refusal" to perform services. The evidence is undisputed that Monroe was the only employee who at any time left Klassen's employment because of the dispute with the union (R. 169, 190). There is no claim that any other employee either struck or refused in the course of his employment with Klassen to perform any duties assigned, or that the union made any attempt to induce or encourage them to do so. As the Board held in *Matter of Denver Building Trades Council (Gould & Preisner)*, 82 NLRB 1195, 1197-1198, inducing or encouraging a single employee is not inducing or encouraging a strike or concerted refusal. There the Board explained this ruling as follows:

> Consistent with common usage of the word "strike," implying *collective* or *group* action by a *number* of employees, the Board has always defined a strike as a *combined* effort on the part of a body of workmen employed by the same employer to enforce a demand by withdrawal of their services. It is readily apparent that Congress did not intend to redefine the word, and that a proscribed strike must involve more than a single employee. Thus, Section 8 (b) (4) (A) speaks of a "concerted" refusal by

> "employees" in the course of "their" employment (emphasis the Board's). Further, the word "strike" is defined in Section 501 of the Act as any "concerted stoppage of work by employees * * * and a concerted slow-down or other concerted interruption of operations by employees." We perceive nothing elsewhere in the Act warranting a departure from this unambiguous language. We find, therefore, that the withdrawal of the services of Moller alone from the Lo Sasso operations did not constitute a strike.

The Board in the *Denver* case accordingly dismissed the complaint insofar as it applied to the Lo Sasso operation since only one employee, Moller, ceased work on this operation. The record showed participation in the same union project by other employees working for other employers but the Board did not consider that this made Moller's conduct a "strike or concerted refusal." Cf. *Matter of Lumber and Sawmill Workers (Santa Ana Lumber Co.),* 87 NLRB, No. 135, 25 LRRM 1229, 1232, C. C. H. Lab. Law Rep., Par. 9482.

Similarly, in the instant case, the conduct of Cook and Cartmill in December was the action by a single employee of any one employer. Cook refused to cross the picket line on December 3, because his employer, the Sawyer Material Company, directed him not to cross the picket line (R. 172-173). This could by no stretch of the imagination be termed a strike or concerted refusal to perform services to force or require his employer to cease dealing with Klassen. And, aside from the fact that he was not employed by the same employer, because Cook acted in obedience to his employer's directions, it is impossible to conjoin his action with the action of either Monroe or Cartmill so that a "concert" of conduct will be established.

Cartmill was the only employee of the Mission Lumber Company who failed to make a delivery to Klassen Company. Hence, there was no strike or concerted refusal

of the employees of the Mission Lumber Company. If the Mission Lumber Company had other employees, there is no proof that they were induced or encouraged in any fashion by the union. Aside from the fact that he was not employed by the same employer as Monroe, the long lapse of time between and the differences in the types of conduct involved in Monroe's quitting on October 9, and Cartmill's refusal to cross the picket line to deliver materials to Klassen on December 3, preclude their being treated together for the purpose of finding either a "strike" or "concerted refusal in the course of their employment" to transport materials. Monroe did not refuse in the course of "his" (not "their") employment to deliver any goods across a picket line. Cartmill did not in the course of "his" (not "their") employment quit work.

Aside from our contention that the conduct of a single employee of each of three separate employers cannot properly be conjoined to constitute "a strike or concerted refusal," the fact that each Monroe and Cartmill was acting with his employer's consent, not forcing or requiring action of his employer, precludes their conduct from constituting a strike or refusal. The courts, and the Board in other cases, have held that the only purpose of Section 8 (b) (4) (A) was to protect innocent employers from "a strike or concerted refusal" of their own employees to handle products in situations where their employees were "forcing or requiring" their own employer to cease a course of business dealing and therefore Section 8 (b) (4) (A) is inapplicable where the employer acquiesces in or directs the conduct of his employees. In *Humphrey* v. *Local 294, International Brotherhood of Teamsters,* 25 LRRM 2318, 2321 (D. C. N. D. N. Y.), the court said that a finding of a strike or concerted refusal to handle hot cargo

> will not be made at this time in the face of the immediate acquiescence of management in the maintenance of the *status quo* of the box.

In *Matter of International Brotherhood of Teamsters (Conway's Express)*, 87 NLRB, No. 130, 25 LRRM 1202, 1207, the Board said:

> three secondary employers, in effect, consented in advance to boycott Conway's. As they consented, their employees' failure to deliver freight to or to accept freight from Conway trucks was not in the literal sense a "strike" or "refusal" to work * * * Section 8 (b) (4) (A) of the Act prohibits *labor organizations* from "forcing or requiring" the participation of neutral employers in secondary boycotts. (Emphasis the Board's.)

Likewise, when an employee quits his employment to take another job, there is neither a "strike" nor a "refusal in the course of * * * employment." In *Uden* v. *Schaeffer,* 110 Wash. 391, 394, 188 Pac. 395, 396, the court granted recovery on a bond which exempted the surety from liability for any damages resulting from strikes, saying:

> A "strike" * * * is the act of quitting work by a body of workmen for the purpose of coercing their employer to accede to some demand they have made on him, and which he has refused; but it is not a strike for workmen to quit work, either singly or in a body, when they quit without intention to return to the work, whatever may be the reason that moves them so to do.

Cf. *Iron Molders' Union* v. *Allis Chalmers,* 166 Fed. 45, 52 (C. A. 7); *Keith Theatre* v. *Vachon,* 134 Me. 392, 397, 187 Atl. 692, 694. In Hillquit, *Collective Bargaining Between Employers and Workers,* 5 Lectures on Legal

Topics, 115 (Ass'n of the Bar of the City of New York, 1928) a strike is defined as

> a concerted suspension of work on the part of a body of workers pending the adjustment of an existing industrial dispute * * * the relations between employer and worker have not been severed. They subsist in a state of belligerent suspension.

That Monroe quit his employment with Klassen Company to take a job with Walter Klassen and that Klassen Company fully acquiesced in Monroe's doing so, is undisputed. On the morning of October 9 before work, Monroe spoke to Harry Klassen about quitting and going to work for Harry's brother, Walter Klassen (R. 130). Harry Klassen testified, "I agreed with him, since we were in trouble and he was a union man" (R. 130-131). Monroe worked for Klassen Company the rest of that day and started to work for Walter Klassen the next morning (R. 131, 174, 177). At the time of the hearing Monroe was still employed by Walter Klassen (R. 174).

There is no evidence that Monroe's quitting was preceded by any demands on Klassen Company. The Carpenters did not decide to place Klassen Company on its unfair list or to picket there until May 13, four days after Monroe quit (R. 247). Actual picketing did not begin until October 14 (R. 202-203). And it is clear that Monroe did not merely suspend work for Klassen Company pending the settlement of any differences but rather that he intended to and did permanently terminate his employment.

Nor is there any dispute but what Cook's refusal to deliver materials was in obedience to his employer's directions to him not to cross the picket line (R. 172-173).

The foregoing questions as to the construction of Section 8 (b) (4) (A) are important and require decision by this Court.

Commerce Issues.

4. Of the questions which this case shares in common with the petitions in Nos. 85 and 108, this Term, the most important is our question 2, whether the unfair labor practices found affect commerce within the meaning of Section 2 (6) and (7) of the National Labor Relations Act. All three cases involve small private residences: No. 85, the remodeling of a home; No. 108, the building of a home by conventional methods; this case, the erection of a "prefabricated" house. In No. 85 and in the instant case, the Board found that the alleged secondary employer was engaged in a purely local construction business, without any "inflow" of materials across state lines (80 NLRB 533, 534-535; R. 24, 73-74). In both cases the Board found that the primary employer purchased varying quantities of materials originating in other states. (80 NLRB 533, 542-543; R. 23-24, 73-74). The Board accordingly based its finding that the unfair labor practices affected commerce upon two theories: (a) since the strike against the primary employer affected commerce, the involvement of a secondary employer also affected commerce; and (b) although the business of one small building contractor does not involve interstate commerce, he is representative of many others throughout the country whose aggregate businesses constitute a substantial interstate commerce which could not be regulated unless its minor component parts are regulated (R. 23-24, 73-74). The court below upheld both of the Board's theories (R. 307-308). Cf. the court's earlier decision in *United Brotherhood* v. *Sperry,* 170 F. 2d 863, 867-868, which it cites and relies upon in the instant connection (R. 308).

Each of the Board's theories of jurisdiction is, we believe, demonstrably erroneous. The first theory ignores the statutory basis of jurisdiction, that it must be the un-

fair labor practice found which has led or tends to lead to a stoppage of the flow of goods in commerce. Sections 2 (7) and 10 (a) of the Act. Where, as the Board found in the instant case and in No. 85, this Term, the union's conduct as to the primary employer was a fair labor practice (R. 29, 42, 80 N. L. R. B. 533, 539, 546-548), the stoppage of the flow of goods to and from the primary employer's business is a fair labor practice, and whatever the effect on commerce may be, it is caused by a fair, rather than an unfair, labor practice. In other words, it is caused by a stoppage which Congress deliberately protected because in the long run the effects of such a stoppage were deemed more beneficial than detrimental.

The legislative history of Section 8 (b) (4) (A) shows that Congress intended thereby to protect "innocent" or "unconcerned" third parties from sympathy strikes and secondary boycotts (H. Rep. 245 on H. R. 3020, 80th Cong., First Sess., pp. 4-5, 23; 93 Cong. Rec. 3834, 4198). Congress did not want a whole chain of interstate businesses to be stopped as the result of a dispute in which they were not involved but rather wanted to limit the effect of strikes to a stoppage of the inflow and outflow of the business enterprise concerned in the dispute (93 Cong. Rec. 4198, 4835-4838, A. 1222). It therefore follows that where the relationship between the primary employer and the secondary employer is wholly intrastate in character and the secondary employer has no interstate relationship with anyone else, the unfair labor practice neither causes nor tends to cause a spread of the stoppage of the flow of goods in interstate commerce. The secondary boycott has no repercussions on the flow of goods in commerce, which is the only interstate aspect of labor disputes comprehended in the phrase "affecting commerce" as defined in Section 2 (7) of the Act. For the only chain of contact between the secondary employer and interstate

commerce is via the primary employer. This chain has been broken by a fair labor practice stoppage. Hence the only thing which "affects commerce" is the fair labor practice.

The second theory assumes that the construction industry, like all other industries whose interstate characteristics have been examined by the courts in determining the applicability of the National Labor Relations Act, operates in a national market. The fact is, however, as has been shown by repeated congressional investigations, reports of various governmental agencies, and studies by economists, that the construction industry is unique in its local characteristics. Every interstate aspect heretofore relied upon by this Court in upholding federal jurisdiction is lacking in the industry of constructing private homes.

Unlike agriculture and mining its product is not sold on a national market. The finished house has fixity of site, connections with sidewalks, streets, sewers, water pipes, bulk and weight, which make its market purely local.[6] Weight and bulk have limited prefabricators to an area of within 200 or 300 miles from the plant.[7]

Unlike every manufacturing industry, the materials used come to rest in some seventy-five thousand small retail establishments before they are purchased and changed into parts of houses by the construction industry. "The small contractor who builds single family residences * * * purchases his day-to-day needs from local hardware and retail lumber dealers."[8] The items purchased "are ma-

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[6]Twentieth Century Fund, *American Housing* (1944), pp. 38-39, 44; Grebler, Leo, *Production of New Housing: A Research Monograph In Efficiency In Production*, N. Y. Social Science Research Council 1950, pp. 9-10, 15.

[7]H. Doc. No. 647, 80th Cong., 2nd Sess., *High Cost of Housing* (Gov't Print. Off., 1948), p. 153; Grebler, *op. cit.*, p. 28.

[8]Stone, Peter A., *Toward More Housing*, 76th Cong., 3rd Sess., TNEC Monograph No. 8 (Gov't Print. Off., 1940), pp. 35, 38, 59, 66, 128, 184.

terials which must go through further manufacture before they are useable in the form of a completed house. In no other comparable industry do we distribute the material necessary for production through retail channels.''[9]

The retail distribution of the raw materials used to build houses reflects in large measure the intrastate source of most of the materials used and the non-fungible character of many of the materials, *i.e.*, due to building codes, local traditions, and climate variations, each locality has its own peculiar set of materials which cannot be used in most other communities.

Because almost every state has sufficient raw materials to build its own homes, because many of the materials are bulky and expensive to ship and because governmental agencies, both state and local, have imposed building restrictions favoring home products, the use of local materials in building houses is astonishingly great. Kansas has within its borders every product needed to build houses.[10] It manufactures its own bricks and other clay products (*e.g.*, sewer pipe). Formerly it also manufactured for nearby states but because of freight rates, each state now manufactures its own bricks.[11] The same is true of sand, gravel and stone, the ingredients of cement.[12] Kansas manufactures its own glass,[13] plumbers supplies,[14] oak flooring[15] and plaster.[16]

''Building codes control the type of materials used • • • Many features of local building codes having to do with materials • • • have been influenced by one after

[9] *Idem*, p. 184.
[10] Dudgeon, Esther J., *Building Materials in Kansas*, University of Kansas (1947), pp. 5, 116-122.
[11] *Idem*, pp. 25-26, 116-117; Keim, Walter G., *Geographical Differentials in Prices of Building Materials*, 76th Cong., 3rd Sess., TNEC Monograph No. 33 (Gov't. Print. Off., 1940), p. 379; Stone, *op. cit.*, p. 63.
[12] Dudgeon, *op. cit.*, pp. 45, 118; Keim, *op. cit.*, p. 409.
[13] Dudgeon, *op. cit.*, pp. 16, 121.
[14] Keim, *op. cit.*, p. 366.
[15] Keim, *op. cit.*, p. 235.
[16] Keim, *op. cit.*, p. 47.

another particular buildings material * * * interest."[17] "Legislative boards, both local and state often prohibit use of out-of-state materials."[18] The combined result of building codes and variations in local taste, custom, climate and topography has produced a complete lack of standardization in building materials. "More than 1,000 varieties of lavatory and sink traps and 19,000 kinds of valves and fittings complicate plumbing. There are 150 strengths of window glass."[19] There are 1,200 sizes of slate roofing.[20] The diversity of building materials from one community to another tends to keep production of building materials local in character. For instance more than a thousand companies, scattered through 40 states, produce paint and varnish.[21] As a result many of these materials do not compete with out-of-state products and their prices vary from town to town[22] solely on the basis of the local situation. Furthermore, the retail distribution of the materials by so many small stores has made it impossible to collect any figures as to the quantities of raw material that go into construction.[23]

All of these factors have resulted in the localism of contractors. "Houses are built almost entirely by local enterprises which operate in only their own city or its suburbs."[24] Builders are limited to their own location by the difficulty of familiarizing themselves not only with local market prospects but also local regulations and their interpretation by administrative officials. Variations in these regulations mean that the builder cannot easily

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[17] Stone, *op. cit.*, p. 39.
[18] *Idem*, p. 140.
[19] *High Cost of Housing*, *op. cit.*, pp. 139-140.
[20] Industrial Standardization and Commercial Standards Monthly, American Standards Ass'n, August, 1939, p. 210. See also Grebler, *op. cit.*, p. 39; Stone, *op. cit.*, p. 61.
[21] Keim, *op. cit.*, p. 123.
[22] Stone, *op. cit.*, pp. 60-64.
[23] Twentieth Century Fund, *op. cit.*, pp. 398-399.
[24] Stone, *op. cit.*, pp. 128, 182.

transfer his pattern of land development, design and lay-out, or use of materials and operational methods from one place to another.[25] Very few builders are even members of any national association.[26]

The labor used in building private residences is usually recruited from the neighborhood. No direct count of the number employed is possible, the Bureau of Labor Statistics making its estimates on the basis of the most indirect evidence.[27] Wage rates vary in erratic fashion from city to city[28] (Tr. 470). Labor practices and methods show similar wide diversity.[29] Collective bargaining contracts pertain only to a given locality.[30] Strikes are usually limited to one project, and never extend beyond the city and immediate vicinity.[31]

From the foregoing it is clear that labor disputes in the private residential section of the building construction industry can in fact have only the slightest interstate repercussions. Under the Wagner Act, the Board did not entertain jurisdiction of cases arising in the building and construction industry on the theory that this industry was essentially local in character. *Johns-Manville Corp.*, 61 N. L. R. B. 1, 2. At the time of the enactment of the Labor Management Relations Act, Senator Taft stated that its provisions respecting jurisdictional strikes would not be generally applicable in the construction industry: "The

[25] Grebler, *op. cit.*, p. 16; Twentieth Century Fund, *op. cit.*, p. 39.
[26] Stone, *op. cit.*, p. 128.
[27] Grebler, *op. cit.*, p. 90.
[28] Stone, *op. cit.*, p. 57; U. S. Bureau of Labor Statistics, Bull. No. 940, *Occupational Outlook Handbook* (Gov't. Print. Off., 1948), p. 177; Bureau of Labor Statistics Bull. No. 626, Peterson, Florence, *Union Scales in Wages and Hours in the Building Trades* (Gov't., Print Off., 1937), pp. 26-46; Bull. No. 730, same title (Gov't. Print. Off., 1942), pp. 28-66; Bull. No. 815, same title (Gov't. Print Off., 1944), pp. 25-60.
[29] U. S. Bureau of Labor Statistics, Bull. No. 680, *Union Wages, Hours and Working Conditions in the Building Trades*, June 1, 1941 (Gov't. Print. Off., 1942), pp. 33-34.
[30] Grebler, *op. cit.*, p. 16.
[31] Haber, William, *Industrial Relations in the Building Industry* (1930), p. 329; U. S. Bureau of Labor Statistics, Bull. No. 694, *Handbook of Labor Statistics*, 1941 ed., Vol. I, pp. 329-342.

construction industry ordinarily would be intrastate commerce and would not be affected by the Act" (93 Cong. Rec. A 3370). While the Board assumed jurisdiction in this case and No. 85 without any appraisal of the interstate characteristics of the industry, as the Board in later cases began to get better acquainted with the facts of the industry it regularly found the effects on interstate commerce of situations such as here involved too insignificant to warrant federal intervention. *Walter J. Mentzer,* 82 N. L. R. B. 389; *Petredis & Fryer,* 85 N. L. R. B. 241; *Row Construction Co.,* 88 N. L. R. B., No. 132; *B. W. Fellers Co.,* 88 N. L. R. B., No. 212; *Denver Building Trades Council,* 90 N. L. R. B., No. 66; *Plumbers & Steamfitters Union,* 90 N. L. R. B., No. 80; *Glazers Union,* 90 N. L. R. B., No. 93.

In the instant case Klassen was engaged in erecting two houses in Overland Park, Kansas, the same town in which Wadsworth "prefabricated" them (R. 120, 123). There was no showing that Wadsworth used any out-of-state materials in its prefabrication of these houses.[32] There was no showing that Klassen used any out-of-state materials in erecting them. Thus neither the facts in the record nor the facts which the Board may judicially notice, justify any finding that the unfair labor practices here involved affected commerce within the meaning of Section 2 (7).

This Court has, of course, always held that the erection of private homes was purely intrastate commerce. *Browning* v. *City of Waycross,* 233 U. S. 16, 22-23. The petitions for a writ of certiorari in Nos. 85 and 108, this Term, fully review the law on this subject and show how radical a departure from established precedent the instant cases are. We will not here repeat what they have said. We

[32] So far as the record shows, whatever interstate purchases Wadsworth made may have been used in the establishment of its factory rather than in the production of houses (R. 120-121).

join with the petitioners in those cases in urging that the holding that a secondary boycott against builders of small private homes affects commerce presents an important question, not only as to the construction of the Act, but also as to the power of Congress under the Commerce clause of the United States Constitution.

When Is an Employer Secondary Rather than Primary?

5. Another important question which this case shares in common with other cases before this Court is whether the relationship between Wadsworth and Klassen was such as to make Klassen a secondary rather than a primary employer. This question is raised by the petitions for certiorari in Nos. 85 and 108, this Term, and the Board has indicated that it intends also to present this question by filing a petition for a writ of certiorari in *Denver Building and Construction Trades Council* v. *National Labor Relations Board,* decided by the Court of Appeals for the District of Columbia on September 1, 1950, not yet officially reported. See Board's petition for a writ of certiorari in *National Labor Relations Board* v. *International Rice Milling Co., Inc.,* No. 313, this Term, p. 12.

The instant case presents the issue of whether the relationship between Wadsworth and Klassen is that of primary employer and secondary employer, in a slightly different setting than it is presented in those cases, due to several facts:

(a) Prior to its labor dispute Wadsworth erected its own houses and it was only thereafter that Klassen was organized for the sole purpose of erecting Wadsworth houses (R. 122, 234-239, Tr. 369, 641, 659).

(b) Wadsworth's production of houses was financed by the bankers who owned the land on which Klassen was erecting houses and who financed Klassen's purchase of

houses from Wadsworth (R. 190-191, 222-223, 239, Tr. 611-612). It was the bankers with whom Klassen made the arrangements to buy Wadsworth houses (R. 222-223). In no other industry do bankers so take over managerial direction and responsibility as in the construction industry.[33] Bankers often specify the subcontractors to be employed, the materials to be used and the labor policies to be followed.[34] In the instant case, the bankers suggested to Wadsworth that it hire Ellison as its attorney (Tr. 642). Wadsworth did so and at once announced it would not renew its contract with the union (R. 128, 234-235, Tr. 310, 402, 597). Ellison had a history as an anti-union lawyer (R. 234-235, Tr. 311-312, 494-496, 642). Klassen was also represented by Ellison (R. 116, 186, 275).

(c) Klassen admittedly wanted to erect the Wadsworth house because he could get it "cheaper" than any other (R. 139, 184, 194, 241).

(d) The relationship in this case was between the manufacturer of "prefabricated" houses and its erector-dealer whereas in the other cases in which petitions are pending the relationship is between the general contractor of a "conventional" house and subcontractor. The actual differences, however, are not as great as the difference in terminology would suggest. The "package" called a house which Klassen purchased from Wadsworth included side wall sections "with windows and doors, hung and locked complete," "interior walls in sections," "your roof A frames, your sheathing cut to size and fit, and your roof shingles, and interior doors" (R. 158). It did not include the floor, which Klassen was making by using a slab of concrete as a footing for the house (R. 157-158). It did not include brick work, exterior side wall shingles, plumbing, wiring, heating, painting or papering

[33] Twentieth Century Fund, *op. cit.*, p. 120; Grebler, *op. cit.*, pp. 101-102.
[34] Haber, *op. cit.*, pp. 62-65.

(R. 158-159).[35] Representatives of Wadsworth were present at the Klassen site supervising the erection of the house (R. 148, 226).

We believe that despite these factual differences the decision of the court below that Klassen was a secondary employer is in conflict with the decision of the Court of Appeals for the District of Columbia in *Denver Building and Construction Trades Council* v. *National Labor Relations Board,* decided September 1, 1950, not yet officially reported. The Board has already stated that it regarded the decision in the *Denver* case as in conflict with the decisions in Nos. 85, 108, and 313, this Term. See Supplemental Memorandums filed by the Board in Nos. 85 and 108, this Term, and the Board's petition for a writ of certiorari in No. 313, pp. 11-12. In the *Denver* case the court held that Section 8 (b) (4) (A) should not be construed to prohibit "every strike which might be construed as having as an object the forcing of someone to 'cease doing business' with someone else" (slip. op., p. 8). Rather the court looked at the legislative history and found Congress meant only to prevent the "conscription of innocent neutrals" (slip. op., p. 11). The court in the *Denver* case set aside a Board order based upon a finding that a strike had been induced to force a general contractor to cease doing business with a subcontractor. It did not regard as controlling, as did the court below in the instant case (R. 308), the separate corporate structure, ownership and management of the alleged primary

[35] To date "prefabrication" has usually been limited to about this type of a "package." The word "prefabrication" therefore designates the performance under factory conditions of the "cutting, fitting and patching that has characterized site construction in the past." Grebler, *op. cit.*, p. 31. This "prefabrication" is often performed in a shed on the same site as the house is erected or a few blocks away. Cf. Tr. 460, 555. The distance between the site where Klassen was erecting the houses and Wadsworth was "prefabricating" them does not appear in the record. Wadsworth's plant is described as at 5630 West 80th, Overland Park, Kansas (R. 120). Klassen's site is at 7500 Santa Fe Trail Boulevard ner Overand Park, Kansas (R. 123).

and secondary employers. Rather, it adopted the principle that an employer who takes over work performed by the primary employer before the labor dispute arose or who brings non-union labor on a project, cannot be regarded as a "neutral" or "secondary" employer. The court relied upon and quoted at length from a decision by Judge Rifkind in *Douds* v. *Metropolitan Federation of Architects,* 75 F. Supp. 672 (S. D. N. Y., 1948), involving a factual situation in many respects analogous to that present in the instant case. In that case there was no common ownership of stock or common officers. Nevertheless, Project Engineering Co. was held an ally of Ebasco Services, Inc., where after a strike at Ebasco, the latter greatly increased the amount of its work which it subcontracted to Project and Ebasco supervisory personnel made regular trips to Project to oversee work on the subcontracts. The court held Section 8 (b) (4) (A) inapplicable. Judge Rifkind, after quoting at length from the legislative history of this section, said (75 F. Supp., at p. 676):

> Examination of these expositions of Congressional purpose indicates that the provision was understood to outlaw what was theretofore known as a secondary boycott. It is to the history of the secondary boycott, therefore, that attention should be directed, and it is in the light of that history that the term "doing business" should be evaluated. * * *
>
> When the term is read with the aid of the glossary provided by the law of secondary boycott it becomes quite clear that Project cannot claim to be a victim of that weapon in labor's arsenal. To suggest that Project had no interest in the dispute between Ebasco and its employees is to look at the form and remain blind to substance. In every meaningful sense it had made itself party to the contest. Manifestly it was not an innocent bystander, nor a neutral. It was

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firmly allied to Ebasco and it was its conduct as ally of Ebasco which directly provoked the union's action.

Cf. *Mills* v. *United Ass'n of Journeymen*, 83 F. Supp. 240, 245 (D. C. W. D., Mo.).

The prevailing practices in the prefabrication industry reinforce our view that Klassen was essentially engaged in a strike breaking operation. The manufacturer of prefabricated houses usually does the erection of the houses in the community where his plant is located. And in instances where an erector-distributor erects the house, the prefabricator usually requires him to present a finished house meeting the prefabricator's specifications and to sell the house under the prefabricator's trade name.[36] Thus, the erector-dealer performs what is in effect, one phase of production in a straight line operation. An employer bearing such a relationship to the primary employer is not neutral or unconcerned. *National Union of Marine Cooks (Irwin-Lyons Lumber Co.)*, 87 NLRB, No. 9, 25 LRRM 1092, 1094. Cf. *International Brotherhood of Teamsters (Conway's Express)*, 87 NLRB, No. 130, 25 LRRM 1202, 1205.

Breadth of Order.

6. In common with the petition in No. 108, this Term, this case presents the issue of whether the breadth of the Board's order was justified by its findings (R. 309-310). The order requires the union to cease and desist from inducing and encouraging employees of employers other than Klassen, as well as of Klassen, to strike or refuse to perform services "where an object thereof is to force or require Klassen & Hodgson, Inc., or any employer or other person" to cease its business relationship

[36] H. Doc. No. 647, 80th Cong., 2nd Sess., *High Cost of Housing* (Gov't. Print. Off., 1948), pp. 153-154.

with Wadsworth (R. 94). The union attacked this provision in the court below on the ground that the Board failed to find that the union had as an object the forcing or requiring of any employer or person other than Klassen to cease any relations with Wadsworth or its products (R. 309-310). Nor did the Board find that the commission of unfair labor practices by the union as to employers other than Klassen was to be anticipated nor make any other findings to justify such an order (R. 310). The court below nevertheless entered its decree in the same broad terms as the Board's order (R. 311). In this respect we believe the decision below fails to follow *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 435-438, and is in conflict with *National Labor Relations Board* v. *Ford Motor Co.*, 119 F. 2d 326, 330-331 (C. A. 5).

Mootness Issues.

7. In common with the petition in No. 85, this Term, this case presents the issue of whether the settlement of the dispute giving rise to the charge of unfair labor practices renders the case moot (R. 3-4, 306-307). In the instant case, not only had Klassen & Hodgson, Inc., been dissolved, Klassen gone to work as a union bricklayer, and Hodgson left the industry, but the wage dispute between Wadsworth and the Carpenters had been settled by a collective bargaining agreement signed February 24, 1949, and the Carpenters had sent letters to all interested persons urging them to buy Wadsworth houses (R. 4, 306-307). In holding that the dispute was not moot (R. 297, 306-307), the court below failed to follow applicable decisions of this Court. *Barker Painting Co.* v. *Local No. 734, Brotherhood of Painters*, 281 U. S. 462, 464. The decision is also in conflict with *National Labor Relations Board* v. *Delaware-New Jersey Ferry Co.*, 90 F. 2d 520

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(C. A. 3), certiorari denied, 302 U. S. 738; *National Labor Relations Board* v. *Reynolds Corp.*, 168 F. 2d 877 (C. A. 5); *Lake Charles Metal Trades Council* v. *Newport Industries, Inc.*, 181 F. 2d 820, 821 (C. A. 5).

Administrative Law Issues.

8. The court below enforced the Board's order on grounds rejected by the Board. Thus, the Board found that none of the union's activities was coercive (R. 90, n. 49, 97). The court enforced upon the finding by the court that the activities involved were coercive (R. 305-306). The court below, therefore, never reached the chief issue to which the Board directed its attention, whether Section 8 (b) (4) (A) proscribes noncoercive inducement or encouragement (R. 78-91) and as to which the Board members divided three to two (R. 78-91, 96-99). This Court has regarded it as a cardinal principle governing the relationship of courts and administrative agencies, that courts may not enforce administrative orders on a ground different from that expressed by the agency in its decision as the basis for its order. "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *S. E. C.* v. *Chenery Corp.*, 318 U. S. 80, 87-88. The court below failed to observe this principle.

9. The instant case was one of the first cases arising under Section 8 (b) (4) (A) to be decided by the Board. The issues presented were both novel and numerous. In subsequent decisions the Board has decided many of the issues here involved in the opposite manner from the way it decided them in this case. If the present case had come before the Board after it had had more experience with the amended Act, it would have been dismissed on any one of four or five grounds. As we pointed out,

p. 48, *supra,* the Board subsequent to this decision regularly dismissed similar cases as having too slight an effect on commerce to warrant assumption of jurisdiction. As we pointed out, pp. 37-38, *supra,* the Board has held that where only one employee of an employer is induced or encouraged, Section 8 (b) (4) (A) is not violated. As we pointed out, pp. 39-40, *supra,* the Board has held that where an employee acts at the direction of his employer or with the latter's acquiescence, there is neither a "strike," "refusal," nor a "forcing or requiring" of the employer within the meaning of Section 8 (b) (4) (A). As we pointed out, p. 53, *supra,* the Board has held that forcing or requiring an employer, who is engaged in a straight line operation with another, to cease doing business with the latter, is not within the intent of Section 8 (b) (4) (A).

The administrative inconsistency on the part of the Board renders its action in this case arbitrary. *National Labor Relations Board* v. *Mall Tool Co.,* 119 F. 2d 700, 702 (C. A. 7). It is most unfair that the Carpenters and Said should be held guilty of unfair labor practices under circumstances in which other unions and union agents have been fully exonerated of any wrongdoing. When the Board found that the construction of the Act which it had adopted in this case was wrong, it should have dropped enforcement proceedings and vacated its order.

Such administrative inconsistency as that of which the Board was guilty in the instant case represents an abuse of the administrative process. It calls for correction by this Court.

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Conclusion.

The questions raised by the decision below present important questions of constitutional law and statutory construction which have not been but should be settled by this Court. The decision below fails to follow applicable decisions of this Court and conflicts with decisions of other courts of appeals. It is respectfully submitted that this petition for a writ of certiorari should be granted.

CLIF LANGSDALE,
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October, 1950.

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APPENDIX.

The relevant provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. III, 141, *et seq.*), are as follows:

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * * * *

"DEFINITIONS

"SEC. 2. When used in this Act—

* * * * * * *

"(3) The term 'employee' * * * shall not include * * * any individual employed as a supervisor * * *

* * * * * * *

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * * * *

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees,

or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

* * * * * * *

"UNFAIR LABOR PRACTICES

"SEC. 8. * * *

* * * * * * *

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * * *

"(4) to engage in, or induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *

* * * * * * *

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

* * * * * * *

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *"

* * * * * * *

DEFINITIONS

SEC. 501. When used in this Act— * * *

* * * * * * *

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

* * * * * * *